Supreme Court, U.
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MICHAEL RODAK, JR., CLERK

CASE NO. 80-16

THE SUPREME COURT OF THE UNITED STATES

TERM, 1980

LAKESIDE POULTRY RANCH, INC., A CALIFORNIA CORPORATION, FLORIAN BRZEZINSKI AND STELLA BRZEZINSKI,

PETITIONERS,

vs.

TIM WALLACE, DIRECTOR OF THE DEPARTMENT OF FOOD AND AGRICULTURE OF THE STATE OF CALIFORNIA; EARL BUTZ, SECRETARY OF THE DEPARTMENT OF AGRICULTURE OF THE UNITED STATES; RUSSELL W. PRATHER; WILLIAM C. CROSBY; KENNETH L. LISSMAN; and H. C. KINNETT, JR.,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

EDWARD E. MARSH, JR., Esq.
Marsh, Graves, Fischbeck & Welch
505 No. Mollison Ave., Suite 201
El Cajon, California 92021
1-714-442-4427

RICHARD F. GERRY, Esq.
110 Laurel Street
San Diego, CA 92101
1-714-238-1136

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Case No. _____

THE SUPREME COURT OF THE UNITED STATES

Term, 1980

LAKESIDE POULTRY RANCH, INC., a California Corporation, FLORIAN BRZEZINSKI and STELLA BRZEZINSKI,	)
Petitioners,	)
vs.	)
TIM WALLACE, Director of The Department of Food and Agriculture of the State of California; EARL BUTZ, Secretary of the Department of Agriculture of the United States; RUSSELL W. PRATHER; WILLIAM C. CROSBY; KENNETH L. LISSMAN; and H. C. KINNETT, JR.,	)
Respondents.	)

PETITION FOR WRIT OF CERTIORARI

The petitioners, LAKESIDE POULTRY RANCH, INC., a California Corporation, FLORIAN BRZEZINSKI and STELLA BRZEZINSKI, pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit rendered in these proceedings on

April 7, 1980.

OPINIONS BELOW

The Order granting Summary Judgment and the Judgment arising from that Order, and the Amended Judgment (unreported) from the United States District Court for the Southern District of California appears hereinafter as Exhibit "A".

The Memorandum Decision and the Judgment of the United States Court of Appeals for the Ninth Circuit (not certified) for publication) appears hereinafter as Exhibit "B".

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit in these proceedings was entered on April 7, 1980. This Petition for Certiorari was filed less than ninety days from the date of said Judgment. The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1254(1) and the applicable rules of this Court.

STATEMENT OF FACTS

Petitioners are engaged in the business of processing eggs and egg products. The business operation was subject to inspection and regulation under the Egg Products Inspection Act, 21 U.S.C. Sec. 1031, et seq. This act superseded a similar California state law which was repealed in 1971.

Respondent PRATHER was an inspector at petitioners' plan in 1976 who petitioners claim harassed petitioners in several specific instances; and, on June 1, 1976, seized and detained 189 cans of egg products on the ground that the egg products had been contaminated and were unfit for human consumption. PRATHER was hired and paid by the State of California. Although PRATHER was enforcing federal law under the Egg Products Inspection Act, he also was operating under the California Administrative Code dealing with the administration

of the voluntary inspection program under a cooperative agreement between the California Department of Food and Agriculture and the United States Department of Agriculture.

Petitioners requested in writing to be provided with an administrative hearing and a laboratory analysis of the seized egg products under the provisions of 7 Code of Federal Regulations, Section 59,300 et seq. This request (and others that followed) were denied by respondents. The egg products are still in detention and petitioners allege unfavorable publicity; and, as a result of respondents' actions, sustained monetary damages.

Petitioners filed an action seeking: (1) relief pursuant to 42 U.S.C. Sec. 1983 and 1985 and 28 U.S.C. Sec. 1343; (2) damages for wrongful seizure of the egg products; and (3) to determine that the Egg Products Inspection Act is unconstitutional

or in the alternative that petitioners are entitled to an administrative hearing and laboratory analysis under the Egg Products Inspection Act.

The federal government filed a companion action against petitioners wherein it sought to forfeit the 189 cans of egg products which it had seized. This action was consolidated with the within action by order of the District Court.

Respondents filed a Motion for Summary Judgment against petitioners and said Motion was granted on March 14, 1978, by Judge Turrentine of the District Court. The Judge found, inter alia:

1. There were no material issues of fact with respect to the seizure of the egg products; and
2. that the respondents were acting properly within the scope of their authority.

On May 25, 1978, Judge Turrentine

amended his judgment for Summary Judgment against petitioners finding inter alia:

1. His prior Summary Judgment was proper;
2. that petitioners' claim under 42 USC Sec. 1983 was dismissed because PRATHER was acting under color of federal law and not state law;
3. that the claim by petitioners for damages for the seized eggs was properly dismissed because of immunity of the Federal Government; and
4. petitioners' request for a declaration of the unconstitutionality of the Egg Products Inspection Act was properly dismissed because the claim did not have a jurisdictional base and because the question of constitutionality of the statute was already before

the Court in the companion case which had been consolidated.

On the Appeal to the Court of Appeals, that honorable Court affirmed the District Court's finding on the Summary Judgment, stating inter alia:

1. PRATHER was acting under color of federal rather than state law, and Section 1983 was not appropriate;
2. the officers of the Department of Agriculture were protected from liability for mistakes of judgment, whether of law or fact, when acting in their official duties by a qualified immunity; and
3. the claim for unconstitutionality of the Egg Products Inspection Act, or the Administrative Hearing, could not be sustained because the claim was brought by

way of Declaratory Relief and the Court had no jurisdiction to consider these issues under 28 USC Sec. 2201. Further, that the constitutionality of the statute could be determined in the companion case which had been consolidated.

QUESTIONS PRESENTED

1. Were the egg inspectors working at the petitioners' plant acting under color of state law so that 42 U.S.C. Sec. 1983 is applicable?

2. Are the issues raised by Question 1, and the issue of whether or not PRATHER had a qualified immunity, questions of disputed fact for a jury and not the proper subject of a Summary Judgment?

3. Should the issue of constitutionality of the Egg Products Inspection Act have been decided by the trial court?

QUESTION NO. 1

Were the Egg Inspectors working at the petitioners' plant acting under color of state law so that 42 U.S.C. Sec. 1983 is applicable?

A. There existed a cooperative agreement between the State of California and the United States Department of Agriculture involving a voluntary inspection program under the Egg Products Inspection Act. Title 3, California Administrative Code, Section 1358.4 et seq. provides that the administration of the program shall be financed by funds from inspection fees collected by the state and that those funds shall be deposited in a trust fund administered by the state. Those monies shall be utilized to pay for salaries, vacation, sick leave, time off, health benefits, and auto travel. Therefore, PRATHER's salary, benefits and expenses were being paid by monies collected by the

state and distributed out of the state's trust fund.

The state regulations deal specifically with labeling of eggs, handling of eggs, and handling of shell eggs for breaking.

Title 3, California Administrative Code Sec. 1353.4, 1953.6 and 1953.12

These were among the state regulations that PRATHER was enforcing and which petitioners contend were improperly enforced.

It is conceded that PRATHER was also enforcing federal law (the Egg Products Inspection Act). In situations where there is a "dual-status" or "hybrid" fact situation involving state power and a non-state power, the test under the Fourteenth Amendment and Section 1983 is whether the state or its officials played a significant role in the result.

Green vs Dumke, 480 F2d 624

(9th Cir. 1973)

Scott vs Eversole Mortuary (1975)
522 F2d 1110 (9th Cir.)

Adickes vs Kress & Co. (1970)
398 US 144

Calhoun vs Doster, 324 F.Supp 736
(M.D. Alabama 1971)

Here the collection of fees by the state to finance PRATHER's salary and expenses, the enforcement by PRATHER of state administrative regulations and his issuing citations and detention orders establish the major role of the state in the alleged harassment and deprivation of civil rights under Section 1983.

B. The "state action" requirement of the Fourteenth Amendment is the equivalent of the "under color of state law" requirement of Section 1983.

Green vs Dumke, 480 F2d 624
(9th Cir. 1973)

It has been further held that as a

corollary to the "state action" requirement, under Section 1983 one need not show that the constitutional or statutory infringement is supported by state law if there is "some nexus between the state involvement and the deprivation."

Bellmer vs Lund, 438 F.Supp. 47, (1977) (D.C.N.Y.)

The employment of PRATHER by the State of California provides this necessary "nexus." There would have been no deprivation of petitioners' rights herein except for PRATHER's employment by the State of California.

C. Hence, the trial court and the Court of Appeals should have found PRATHER was working under color of state law, even though having federal connections also, and that 42 U.S.C. Section 1983 was applicable to this case.

QUESTION NO. 2

Are the issues raised by Question 1, and the issue of whether or not PRATHER had a qualified immunity, questions of disputed fact for a jury and not the proper subject of a Summary Judgment?

A. It is conceded that both federal and state employees acting under color of federal law have a qualified immunity protecting them from liability for mistakes of judgment, whether of law or fact, when acting in their official duties.

Scheuer vs Rhodes, 416 US 232 (1974)

Butz vs Economou, 438 US 478 (1978)

Mark vs Groff, 521 F2d 1376 (9th Cir. 1975)

B. Under the qualified immunity doctrine, a government officer acting within the scope of his duties is insulated from damage suits only if:

(1) at the time and in light of all the circumstances there existed reasonable grounds for the belief that the action was appropriate; and

(2) the officer acted in good faith.

Each of these issues present a factual question for a jury to determine.

Donaldson vs O'Connor, 519 F2d 59 (5th Cir. 1975)

Here the petitioners are alleging unwarranted citations, harassment of employees and seizure and detention of eggs and egg products without justification. These are acts which certainly are issues of fact as to whether they are outside the scope of qualified immunity.

Hence, the trial court should have not granted summary judgment against petitioners, thereby depriving them from their right to have a jury decide these important

issues.

QUESTION NO. 3

Should the issue of constitutionality of the Egg Products Inspection Act have been decided by the trial court?

A. The validity of a statute may be challenged in a proceeding for Declaratory Relief in federal courts, in an appropriate pleading whether or not further relief is or could be sought.

28 U.S.C. Sec. 2201

B. The Court of Appeals in this case stated in its Memorandum, inter alia:

> "A proceeding under the Declaratory Judgment Act, 28 USC Sec. 2201 afford no jurisdiction for the court to consider an issue when no question otherwise exists as a basis for conferring jurisdiction. Here, all claims of the plaintiff were determined to be without substance and were

disposed of by summary judgment."

This statement begs the issue of the constitutionality of the statute. Petitioners sought the answer from the court as to the statute's constitutionality as a separate issue or prayer than the request for relief under 42 U.S.C. Sec. 1983. Simple justice under 28 U.S.C. Sec. 2201 requires that the trial court should have determined the issue of constitutionality of the statute. Such a finding may have precluded the same question in the companion consolidated case to this one; and, may even have precluded that second trial altogether thereby resulting in judicial economy.

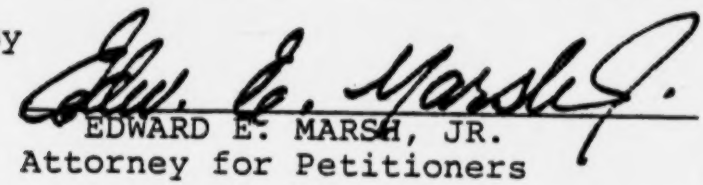
CONCLUSION

Petitioners request this Honorable Court to issue a Writ of Certiorari in this matter to review the decision of the Court of Appeals based upon the facts and

law applicable to those facts in this case.

DATED: June 27, 1980

MARSH, GRAVES, FISCHBECK & WELCH

By 

EDWARD E. MARSH, JR.
Attorney for Petitioners

VERIFICATION

STATE OF CALIFORNIA)
) ss
COUNTY OF SAN DIEGO)

I, FLORIAN BRZEZINSKI, am the President of LAKESIDE POULTRY RANCH, INC., a California Corporation, Petitioner herein. I have read the foregoing PETITION FOR WRIT OF CERTIORARI and know the contents thereof; and I declare that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

Florian Brzezinski
FLORIAN BRZEZINSKI

Subscribed and sworn to before me this 30th day of June, 1980.

Marlys L. Robbins
Notary Public in and for said State and County.

OFFICIAL SEAL
MARLYS L. ROBBINS
NOTARY PUBLIC · CALIFORNIA
Principal Office, San Diego Co. Calif.
My Commission Exp. April 20, 1981

APPENDIX

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APPENDIX

EXHIBIT "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LAKESIDE POULTRY RANCH, a California corporation, et al., Plaintiffs, v. TIM WALLACE, Director of the Department of Food and Agriculture of the State of California, et al., Defendants.	Civil No. 76-874-T ORDER GRANTING SUMMARY JUDGMENT

This matter came on for hearing on March 13 and 14, 1978. Defendants, state and federal officials involved with administration of the Egg Products Inspection Act (21 U.S.C. § 1031 et seq.), moved the court to dismiss plaintiffs' complaint or, alternatively, to award summary judgment. Because the court finds that this is an appropriate instance in which to grant summary judgment, the merits of the complaint are not discussed here.

The gravamen of the complaint is that defendants conspired to deprive plaintiffs of their civil and constitutional rights by interrupting and damaging their egg business, harassing employees, and preventing plaintiffs from obtaining an appellate hearing after the seizure of 189 thirty-pound containers of egg product.

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APPENDIX--EXHIBIT "A"

The court notes first that the individual plaintiffs (the Brzezinski's) do not have standing to sue for violation of their corporation's rights. The corporation is the only entity that may sue in its behalf in this case.

The court turns next to an examination of whether there are any issues of material fact in this action, such that Lakeside Poultry may withstand summary judgment. Defendants argue that there is no question of material fact as to their involvement in any alleged conspiracy. Plaintiffs assert that there are questions of fact. However, the affidavits and other documents indicate to the contrary. Defendants' affidavits and correspondence suggest that defendants were properly performing their duties. Plaintiffs, in their affidavits, contend only that the plant inspector, Prather, acted improperly, and that no appellate hearing was granted.

None of the materials attached to the opposition papers even hints at the existence of a conspiracy, and there are no facts offered to show that there was a conspiracy. Fed.R.Civ.R. 56 (e) provides that a party opposing summary judgment "may not rest upon the mere allegations or denials of his pleading, but his response ...must set forth specific facts showing that there is a genuine issue for trial." Since plaintiffs have rested upon the allegations of their opposition pleading, and thus failed to demonstrate any genuine issue, it is appropriate to grant summary judgment to defendants.

Accordingly,

IT IS ORDERED that defendants' motion for summary judgment be, and the same hereby is, granted.

DATED: March 20, 1978.

/s/ Howard B. Turrentine
United States District Judge

APPENDIX--EXHIBIT "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LAKESIDE POULTRY RANCH, INC., A California Corporation, FLORIAN BRZEZINSKI, and STELLA BRZEZINSKI, Plaintiffs, v. TIM WALLACE, Director of the Department of Food and Agriculture of the State of California, EARL BUTZ, Secretary of the Department of Agriculture of the United States, RUSSELL W. PRATHER, WILLIAM C. CROSBY, KENNETH L. LISSMAN and H. C. KENNETT, JR., Defendants.	)	Civil No. 76-0874-T JUDGMENT

This action came on for hearing on the motion of the defendants for summary judgment, Michael H. Walsh, United States Attorney, by D. Michael Waltz, Assistant U. S. Attorney, and Dennis Dawson, Deputy Attorney General of the State of California, appearing for defendants, and E. Mac Amos, Jr., appearing for plaintiffs. The court, having considered the files and pleadings in this case and the arguments of counsel, and being advised in the premises, and having heretofore filed an order in this case setting forth its findings,

IT IS ORDERED AND ADJUDGED,

APPENDIX--EXHIBIT "A"

That defendants are entitled to judgment as a matter of law and that judgment be and the same is hereby entered in favor of defendants.

Dated this 31 day of March, 1978.

/s/ Howard B. Turrentine
United States District Judge

PRESENTED BY:

MICHAEL H. WALSH
United States Attorney

/s/ D. Michael Waltz

D. MICHAEL WALTZ
Assistant U. S. Attorney

APPENDIX--EXHIBIT "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LAKESIDE POULTRY RANCH, A California corporation, et al., Plaintiffs, v. TIM WALLACE, Director of the Department of Food and Agriculture of the State of California, et al., Defendants.	Civil No. 76-874-T MEMORANDUM AND ORDER DENYING MOTION FOR RECONSIDERATION AND GRANTING MOTION TO AMEND JUDGMENT

This matter came on for hearing on May 22, 1978. Plaintiffs moved the court to reconsider its Order Granting Summary Judgment to defendants on plaintiffs' claim under 42 U.S.C. § 1985, and to amend that judgment to include disposition of the remaining causes of action. Having considered the parties' written and oral arguments, the court finds that there is no reason to alter the previous Order; however, an amendment to that Order is appropriate.

The court is satisfied that granting summary judgment to defendants was correct. That decision was based on the conclusion that plaintiffs failed to demonstrate that there was a genuine issue whether there was a conspiracy among defendants, and that defendants were entitled, as a matter of law, to judgment in their favor. That remains the finding of the court. There is an additional ground, not discussed in

the Order, for awarding summary judgment on the § 1985 claim. That is, plaintiffs did not allege that the purported conspiracy was invidious or class-based, as is required in a complaint for conspiracy under § 1985(3). Griffin v. Breckenridge, 403 U.S. 88 (1971).

The court amends the March 20 Order as follows:

Plaintiffs' claim under 42 U.S.C. § 1983 is dismissed for failure to state a claim. Section 1983 protects against deprivation of rights under color of state law. In the present case, the federal defendants and state defendant Prather were acting under color of the Federal Egg Products Inspection Act, a federal law. As for state defendant Wallace, there is no indication whatever of his involvement in any deprivation of civil rights.

Dismissal is the proper disposition also of plaintiffs' claim for damages for seized eggs. The doctrine of sovereign immunity bars suit because it is the United States that would ultimately have to pay the damages; the individual defendants would not be called upon to remunerate plaintiffs. See Dugan v. Rank, 312 U.S. 609,611 (1963). In such a case the United States may not be sued without its permission. Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949). The Government has not consented to be sued here. Since this action is really one sounding in tort, plaintiffs should follow the tort claim procedures established by Congress.

APPENDIX--EXHIBIT "A"

Plaintiffs' final cause is a request for declaratory judgment of the unconstitutionality of the Egg Products Inspection Act. The court dismisses this claim as well. For one thing, this cause of action does not have a jurisdictional base; its incorporation of the grounds set forth in the first cause of action is ineffectual since the first cause has been dismissed. Second, the question of the Act's constitutionality has been raised by plaintiffs in its counterclaim to the Government's forfeiture action concerning the same eggs. The court divines no reason to consider this issue twice.

Accordingly,

IT IS ORDERED that plaintiffs' motion for reconsideration be, and the same hereby is, denied.

IT IS FURTHER ORDERED that the remainder of plaintiffs' complaint be, and the same hereby is, dismissed.

DATED: May 24, 1978.

/s/ Howard B. Turrentine
United States District Judge

EXHIBIT "B"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAKESIDE POULTRY RANCH, INC., a California corporation, Florian Brzezinski, and Stella Brzezinski,	)	No. 78-2325
Plaintiffs-Appellants,	)	
v.	)	MEMORANDUM
TIM WALLACE, Director of the Department of Food and Agriculture of the State of California; Earl Butz, Secretary of the Department of Agriculture of the United States; Russell W. Prather, William C. Crosby, Kenneth L. Lissman and H. C. Kinnett, Jr.,	)	
Defendants-Appellees.	)	

Appeal from the
United States District Court for the
Southern District of California

Before: SNEED and PREGERSON, Circuit Judges, and TEMPLAR, District Judge*

Plaintiff, Lakeside Poultry Ranch, Inc. (Lakeside), was engaged in the business of processing eggs and egg products

*Honorable George Templar, Senior United States District Judge for the District of Kansas, sitting by designation.

in Lakeside, California. This operation was subject to inspection and regulation under the Egg Products Inspection Act, 21 U.S.C. Sec. 1031 et seq., a federal act which superseded state regulations. One Prather, a resident egg inspector, had the responsibility of enforcing provisions of the federal law and, in doing so, had found a number of violations on the premises of the plaintiff's plant, including 189 cans of egg product which he had seized and detained on the ground that the egg product had been contaminated and was unfit for human consumption. The plaintiff claims that the conduct of Prather amounted to harassment and a design on his part to injure Lakeside's business and reputation.

A forfeiture proceeding was instituted (United States v. 189 Thirty-Pound Containers of Egg Products, Civil No. 76-0954-T), and the case from which this appeal is taken was filed by Lakeside claiming damages for an alleged violation of plaintiff's civil rights under Sections 1983 and 1985 of Chapter 42, U.S.C. and claiming that the Egg Products Inspection Act is unconstitutional or in the alternative, that the plaintiff was entitled to an administrative hearing and a laboratory analysis under the act, but was denied them.

The plaintiff intervened in the forfeiture proceeding and filed a counterclaim seeking damages and challenging the constitutionality of the Egg Products Inspection Act. Plaintiff's motion for summary judgment in that proceeding was denied.

APPENDIX--EXHIBIT "B"

It appears that Prather worked as resident egg inspector at Lakeside, pursuant to his appointment under the Egg Products Inspection Act. Prather had previously worked as an egg inspector for the state of California and continued to receive pay checks drawn upon the state's treasury, after his appointment as a federal resident egg inspector.

The trial judge granted a motion for summary judgment in favor of the defendants on the Section 1983 claim because defendants were found to be acting under color of federal rather than state law. The district judge also found that the Section 1985 claim should be dismissed for failing to allege that the claimed discrimination was invidious or class-based as required by Griffin v. Breckenridge, 403 U.S. 88 (1971). The plaintiff appeals to this court. We see no reason to disturb these rulings and therefore affirm.

Plaintiff argues that this situation is analogous to Green v. Dumke, 480 F.2d 624 (9th Cir. 1973), holding that a state college which discriminated in dispersing federal financial benefits had acted under color of state law. Unlike the college in Green, Prather's only connection with the state was that his check was drawn from the state treasury. His connections with the federal government are significant. United States Department of Agriculture officials closely supervised him, the statutes and regulations he applied were federal, and the federal government reimbursed the state treasury for his salary, 21 U.S.C. Sec. 1053 (a). Furthermore,

APPENDIX--EXHIBIT "B"

Prather's inspections could not have been under color of state law because California had repealed its egg inspection act soon after the passage of the federal act. The trial court therefore correctly concluded that Prather was not acting under color of state law and properly granted summary judgment on the Section 1983 cause of action.

The officers of the Department of Agriculture argue that a qualified immunity protects them from liability for mistakes of judgment, whether of law or fact, when acting in their official sphere of responsibility. The same qualified immunity is available to state employees acting under color of federal law. Butz v. Economou, 438 U.S. 478 (1978).

The court below found that the plaintiff had failed to demonstrate that there was a genuine issue of conspiracy and ordered summary judgment. Although the extent of immunity depends on questions of fact, summary judgment is appropriate where the uncontroverted facts show that the officials were acting within the scope of their official duties. Language in both Scheuer v. Rhodes, 416 U.S. 232, 250 (1974) and Butz v. Economou, supra, at 507-08, supports an order of summary judgment when no issues of fact exist on the question of immunity. Otherwise, federal officials would be required to defend frivolous suits and be distracted from performing their official responsibilities.

APPENDIX--EXHIBIT "B"

Though the United States is not a formal party to this action, plaintiff's attempt to attack the constitutionality of the Federal Egg Products Inspection Act by way of a declaratory judgment proceeding, coupled with a request for injunctive relief seeking to enjoin the federal agency and its officers from continuing the enforcement of the act, cannot be sustained. In such circumstances the suit is barred because the compulsion sought is actually against the sovereign, though nominally directed against the individual officers. Since it is, in substance, a suit against the government, in the absence of its consent, the court has no jurisdiction. Dugan v. Rank, 372 U.S. 609, 620 (1963); Larson v. Domestic & Foreign Corp., 337 U.S. 682, 688 (1949).

The constitutional challenge of Lakeside to the Egg Products Inspection Act and the request, in the alternative, to be provided with an administrative hearing or a laboratory analysis, were properly denied by the court. Relief was sought by way of declaratory judgment.

A proceeding under the Declaratory Judgment Act, 28 U.S.C. Sec. 2201, affords no jurisdiction for the ccurt to consider an issue when no question otherwise exists as a basis for conferring jurisdiction. Here, all claims of the plaintiff were determined to be without substance and were disposed of by summary judgment.

Furthermore, the trial court observed that plaintiff had, in the forfeiture

action, by way of counterclaim, raised the issue of the constitutionality of the act and could, in that proceeding, enforce whatever rights it might have to obtain due process. Thus, there appears to be no basis for plaintiff's contention that it was not provided due process.

The rulings of the trial court are hereby affirmed.

APPENDIX--EXHIBIT "B"

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOTICE OF ENTRY OF JUDGMENT

Judgment was entered in this case as of the file stamp date on the attached decision of the court.

Petition for Rehearing (FRAP 40)

A petition for rehearing may be filed within 14 days from the entry of judgment. A petition should not be filed in order to reargue the case but should only be filed to direct attention to material facts of law possibly overlooked in the decision. The 15 page limit allowed by the rule must be observed. In addition, 3 copies of the petition are required unless petition includes a suggestion for rehearing en banc (in such instances 24 copies are required in addition to the original). The petition should of course be directed to the Clerk of the Court. A petition for rehearing must be submitted on 8 1/2 x 11 inch paper, must show complete proof of service to all parties, and the original must contain the original signature of the counsel/pro per litigant submitting the petition.

Bill of Costs (FRAP 39)

See Rule 39 of FRAP for information as to which party is allowed costs on appeal. If a party is allowed costs, the bill of costs must be filed within 14 days from the entry of judgment. Objections to the bill of costs by an adversay party must

be filed within 7 days thereafter.

Issuance of the Mandate (FRAP 41)

The mandate is the certified copy of the judgment. The mandate is scheduled to be issued 21 days from the entry of judgment unless the court directs otherwise. A timely petition for rehearing will stay the issuance of the mandate. If the petition is denied, the mandate will be entered 7 days later. A direct motion for stay of mandate must be filed in an original plus three copies.

Petition for Writ of Certiorari

For information concerning the filing of this petition, refer to the rules of the Supreme Court of the United States.

THE SUPREME COURT OF THE UNITED STATES

LAKESIDE POULTRY RANCH, INC., et al., Petitioners, vs. TIM WALLACE, Director of The Department of Food and Agriculture of the State of California, et al., Respondents.	PROOF OF SERVICE

I, the undersigned, certify and declare that I am a citizen of the United States, over the age of 18 years, employed in the County of San Diego, State of California, and not a party to the above-entitled cause. On July 2, 1980 I served on each attorney of record three copies of the PETITION FOR WRIT OF CERTIORARI by depositing them in the United States mail at El Cajon, California, in a sealed envelope with the postage thereon prepaid addressed as follows:

MICHAEL H. WALSH
United States Attorney
United States Courthouse
San Diego, CA 92189

DENNIS W. DAWSON, Esq.
Deputy Attorney General
Department of Justice
State of California
110 West "A" Street, Suite 600
San Diego, CA 92101

Executed on July 2, 1980, at El Cajon, California.

Velma T. Connely
VELMA T. CONNELY

80-16

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IN THE
Supreme Court of the United States

October Term 1980

No. 80-16

LAKESIDE POULTRY RANCH, INC., et al.

Petitioners,

v.

TIM WALLACE, Director of the Department of Food and Agriculture of the State of California, et al.

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE DEUKMEJIAN,
Attorney General of the State of California
R.H. CONNETT,
Assistant Attorney General
DENNIS W. DAWSON, Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101
(714) 237-7880

Counsel for State of California Respondents Tim Wallace and Russell W. Prather

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Ninth Circuit (not certified for publication) appears as Exhibit "A" to the Appendix of the petition (Pet. App. A 21- A 28). The Order

Granting Summary Judgment, Judgment, and Amended Judgment (unreported) is attached as Exhibit B to the Appendix of the petition (Pet. App. B 30- B 34).

QUESTIONS PRESENTED

Whether the petitioners' claim under 42 U.S.C. 1983 was correctly dismissed for lack of jurisdiction on the ground that Egg and Poultry Quality Control Inspector Prather acted pursuant to federal and not state law?

Whether the fact that a state employee acting under color of federal law may be entitled to a qualified immunity is a proper subject to be disposed of by summary judgment?

Whether the trial court had jurisdiction to consider petitioners' cause of action for a declaratory judgment regarding the constitutionality of the Egg Products Inspection Act?

JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit was entered on April 7, 1980. The petition for writ of certiorari was filed on July 7, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This action was originally brought in the Superior Court of the

State of California for San Diego County by petitioners Lakeside Poultry Ranch, Inc. and Florian and Stella Brzezinski in an attempt to preclude the enforcement of the federal Egg Products Inspection Act by Egg and Poultry Quality Control Inspector Russell W. Prather at Lakeside Poultry Ranch in Lakeside, California. On September 1, 1976, the action was removed by the United States Attorney for the Southern District of California pursuant to 28 U.S.C. 1442(a)(1).

Pursuant to a cooperative agreement between the United States and California, authorized under 21 U.S.C. 1038, respondent Prather was employed by the State of California to enforce the provisions of the federal Egg Products Inspection Act at petitioners' place of business, Lakeside Poultry Ranch. Petitioners sought a declaration that the federal Egg Products Inspection Act is unconstitutional and that petitioners were entitled to an appeal of inspection decisions under procedures set forth in the Act. Petitioners also sought damages under 42 U.S.C. sections 1983 and 1985 as a result of the fact that, under the cooperative program, Inspector Prather cited petitioners for various violations of the federal act and, based on these violations, withheld approval of certain egg products processed by petitioners.

On February 10, 1978, respondents Prather and Wallace and the named federal respondents filed a motion for summary judgment on the grounds that there were no material issues of fact with regard to the existence of a

conspiracy among respondents, that respondents acted under color of federal and not state law, and that the court had no jurisdiction to grant a declaratory judgment.

The District Court granted summary judgment to respondents on petitioners' claim brought under 42 U.S.C. 1985, finding that petitioners failed to demonstrate that there was a genuine issue as to whether there was a conspiracy among respondents. (Pet. App. A 21-A 27.) The Court also found that petitioners failed to state a claim under 42 U.S.C. 1983 since respondents acted under color of federal and not state law. (Pet. App. A 27.) Since the Court dismissed petitioners' 1983 and 1985 damage claims it also found that it lacked jurisdiction to rule on petitioners' constitutional challenge to the federal Egg Products Inspection Act. (Pet. App. A 28.) The Court of Appeals affirmed. (Pet. App. B 29-B 36.)

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

No special or important reasons as to why this Honorable Court should grant a writ of certiorari have been presented by petitioners as required by Rule 17. The decision of the Court of Appeals, affirming the judgment of the District Court, was entirely correct and is not in conflict with any decision of another Court of Appeals or of this Court.

1. The District Court correctly dismissed petitioners' claim under 42 U.S.C. 1983 on the ground that Inspector Prather acted pursuant to federal and not state law.

Petitioners state that there existed ". . . a cooperative agreement between the State of California and the United States Department of Agriculture involving a voluntary inspection program under the Egg Products Inspection Act." (Pet. 9.)

It should be noted that there is and was no cooperative agreement between the State of California and the United States Department of Agriculture relating to any voluntary inspection program under the Egg Products Inspection Act. The Egg Products Inspection Act (21 U.S.C. 1031 et seq.) contains no provisions governing a voluntary inspection program but imposes mandatory inspection requirements on egg handlers.

Petitioners cite Title 3, California Administrative Code, sections 1358.4 et seq. and argue that these provisions govern state financing of the administration of a voluntary inspection program and were the state regulations that Prather was allegedly improperly enforcing (Pet. 9-11). However, these cited provisions relate only to an industry-financed, inspection program for shell eggs not to be broken at an egg processing plant. Prather had no involvement with and no enforcement responsibilities with regard to inspecting shell eggs not to be broken at an egg processing plant.

On the contrary, Prather was enforcing a federally financed, mandatory inspection program under the federal Egg Products Inspection Act to assure compliance by petitioners with respect to eggs to be broken at Lakeside Poultry Ranch and processed at this plant as egg products. Prather's salary, benefits, expenses, and the entire cost of the program were financed not by the state, nor by industry, but by the federal government pursuant to 21 U.S.C. 1053. Therefore the regulations cited by petitioners have no applicability to the instant case.

Moreover, no provision of state law governed the inspection of egg products at the time Prather was assigned to the Lakeside Poultry Ranch. Pursuant to 21 U.S.C. 1052 the State of California was prohibited from enacting or enforcing additional or different requirements from applicable federal requirements in this area. Sections 27951 through 28141, inclusive, of the California Agricultural Code governed egg products prior to 1971, but those sections were repealed in their entirety in 1971 1/ after the enactment by Congress of the federal Egg Products Inspection Act. Since Prather was not assigned to the Lakeside Poultry Ranch until 1976, the conclusion necessarily follows that state law did not even govern the inspection of egg products at the time of his assignment. Thus Prather's inspections could not have been performed under color of state law.

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1. Repealed by Stats. 1971, Ch. 292, section 1, effective July 8, 1971.

Petitioners concede that Prather was enforcing federal law. (Pet. 10.) The Court of Appeals for the Ninth Circuit specifically noted that his connections with the federal government were significant.2/ The employment of Prather by the state to enforce federal law is the only connection between Prather and the state in this case. This connection by itself is not sufficient to support a conclusion that the state or its officials played a significant role in this case.

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2. As the Court observed:

> "Plaintiff argues that this situation is analogous to Green v. Dumke, 480 F.2d 624 (9th Cir. 1973), holding that a state college which discriminated in dispersing federal financial benefits had acted under color of state law. Unlike the college in Green, Prather's only connection with the state was that his check was drawn from the state treasury. His connections with the federal government are significant. United States Department of Agriculture officials closely supervised him, the statutes and regulations he applied were federal, and the federal government reimbursed the state treasury for his salary, 21 U.S.C. 1053 (a)." (Pet. App. B 31.)

In Askew v. Bloemker (7th Cir. 1976) 548 Fed.2d 673 the Court of Appeal held that although three defendants remained Municipal Police Department employees during their assignment to a federal agency, since all defendants were acting pursuant to federal authority and not under color of any state law, no claim existed under 42 U.S.C. 1983. Thus, under Askew, supra, the mere fact that Prather remained a state employee during his assignment to enforce federal law would not support a claim under 42 U.S.C. 1983.

The District Court validly concluded that at the time Inspector Prather carried out his official duties he acted pursuant to the provisions of the federal Egg Products Inspection Act. The District Court therefore correctly dismissed petitioners' claim under 42 U.S.C. 1983 for lack of jurisdiction. No claim lies under section 1983 for actions taken under color of federal law. District of Columbia v. Carter (1973) 409 U.S. 418.

2. Although technically a state employee Prather acted under color of federal law when inspecting eggs at Lakeside Poultry Ranch and thus acted in the course of his official duties under the Egg Products Inspection Act at all times relevant to this case. State employees acting under color of federal law are entitled to a qualified immunity protecting them from liability for mistakes in judgment, whether of law or fact, when acting in their official sphere of responsibility. Butz v. Economou (1978) 438 U.S. 478.

Prather's good faith and belief that the enforcement actions he took was appropriate were based on reasonable grounds, i.e., his informed use of the Regulations Governing The Inspection Of Eggs And Egg Products (7 C.F.R. 59) and his use of the Egg Products Inspector's Handbook, both of which guided his actions as an inspector. Therefore, he was entitled to a qualified immunity protecting him from liability for acts done in the course of his official duties. Scheuer v. Rhodes (1974) 416 U.S. 232.

Both Scheuer, supra, and Butz, supra, support an order of summary judgment when no issues of fact exist on the question of immunity. Although the extent of the immunity depends on questions of fact, summary judgment is appropriate where the uncontroverted facts show that the officials were acting within the scope of their official duties. Otherwise officials would be required to defend frivolous suits and be distracted from performing their official responsibilities. The District Court validly found that "Defendants' affidavits and correspondence suggest that defendants were properly performing their duties." (Pet. App. A 22.) Because no issues of fact existed on the question of immunity the District Court correctly granted summary judgment to respondents in this case.

3. The District Court correctly refused to consider petitioners' constitutional challenge to the federal Egg Products Inspection Act. Relief was sought by way of declaratory judgment.

The Court of Appeals for the Ninth Circuit correctly concluded that a proceeding under the Declaratory Judgment Act, 28 U.S.C. 2201, affords no jurisdiction for the court to consider an issue when no question otherwise exists as a basis for conferring jurisdiction. (Pet. App. B 33.) All of the claims of petitioner were determined by the trial court to be without substance and were disposed of by summary judgment. Petitioner had incorporated its cause of action for declaratory judgment in the ground set forth in the first cause of action under 42 U.S.C. 1983. Since the first cause of action had been dismissed, the trial court was without jurisdiction to consider petitioners' cause of action for declaratory judgment.

Further, the trial court also correctly observed that petitioner had brought a separate forfeiture action concerning the same eggs which were the subject of this litigation (Pet. App. A 28). Since the question of the constitutionality of the federal Egg Product Inspection Act had been unsuccessfully raised by petitioners in the forfeiture action, the trial court correctly concluded that there was no reason to consider this issue twice.

* * *

CONCLUSION

For the foregoing reasons, the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

GEORGE DEUKMEJIAN, Attorney General
R. H. CONNETT,
Assistant Attorney General
DENNIS W. DAWSON,
Deputy Attorney General

Counsel for State of California
Respondents Tim Wallace and
Russell W. Prather

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

BARBARA L. HERWIG
LINDA JAN S. PACK
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. Whether petitioner stated a cause of action pursuant to 42 U.S.C. 1983 for deprivation of federal rights "under color of state law."

2. Whether the district court erred in entering summary judgment for respondents because of the existence of a genuine issue of material fact.

3. Whether the Declaratory Judgment Act, 28 U.S.C. 2201, conferred jurisdiction on the district court to consider petitioner's challenge to the constitutionality of the Federal Egg Products Inspection Act, 21 U.S.C. 1031 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 29-34) is noted at 618 F. 2d 116 (table). The district court's order granting summary judgment (Pet. App. 21-23) and its memorandum and order denying reconsideration and amending the judgment (Pet. App. 26-28) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1980. The petition for a writ of certiorari was filed on Monday, July 7, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In this action, petitioner, a producer of liquified egg products, sought monetary and injunctive relief against various state and federal officials in their individual and official capacities.[1] The complaint alleged that respondents had conspired to deprive petitioner of its constitutional and civil rights by conducting inspections of petitioner's plant under the Federal Egg Products Inspection Act (21 U.S.C. 1031 *et seq.*) ("Inspection Act") in order to harrass petitioner's employees, interrupt its production, and damage its business, and by denying petitioner a hearing after its egg product had been seized as unfit for human consumption. Petitioner also sought a declaratory judgment that the Inspection Act is unconstitutional.

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[1] The named defendants were the Secretary of Agriculture; three Department of Agriculture (USDA) supervisors who enforced the Federal Egg Products Inspection Act; the resident inspector at petitioner's plant; and the director of the state agriculture department.

The district court granted respondents' motion for summary judgment and dismissed the complaint (Pet. App. 21-28). The court found that respondents had acted under color of federal rather than state law and hence that petitioner had failed to state a cause of action pursuant to 42 U.S.C. 1983 (Pet. App. 27). The court also rejected petitioner's claim pursuant to 42 U.S.C. 1985(c) on the ground that the requisite allegation of an invidious or class-based conspiracy had not been made (Pet. App. 27). In addition, the court determined (*id.* at 22, 26) that respondents were entitled to judgment as a matter of law because their summary-judgment submissions established that they "were properly performing their duties" (*id.* at 22) and petitioner failed to raise a genuine issue of material fact regarding the existence of a conspiracy. With respect to the seizure of petitioner's egg product, the court held that petitioner's claims sought relief against the United States and therefore were barred by the doctrine of sovereign immunity (*id.* at 27).[2] Finally, the court concluded that it lacked jurisdiction to consider petitioner's challenge to the constitutionality of the Inspection Act (*id.* at 28).[3]

On petitioner's appeal, the court of appeals affirmed (Pet. App. 29-34). The court sustained the district court's rulings that neither 42 U.S.C. 1983 nor 42 U.S.C. 1985(c) provided a cause of action because respondents had acted under color of federal rather than state law and were not alleged to have engaged in a conspiracy involving invidious or class-based discrimination (Pet. App. 31-32).

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[2] The court recognized (Pet. App. 27) that petitioner could pursue its remedies in this regard under the Federal Tort Claims Act (28 U.S.C. 1346(b)).

[3] The court also noted (Pet. App. 28) that petitioner was litigating this issue in the government's forfeiture action concerning the seized egg product.

Moreover, agreeing with the district court that petitioner had failed to raise any factual issue, the court concluded (Pet. App. 32) that summary judgment was properly granted to respondents under *Butz* v. *Economou*, 438 U.S. 478 (1978), and *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). The court also upheld the district court's determination that petitioner's claims relating to the seizure of its product sought relief against the United States and thus were foreclosed by the principle of sovereign immunity (Pet. App. 33). Finally, the court rejected the contention that the Declaratory Judgment Act (28 U.S.C. 2201) established jurisdiction in the district court to consider petitioner's constitutional challenge to the Inspection Act (Pet. App. 33-34).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decisions of this Court or of the other courts of appeals. Moreover, the petition raises no issues of general public importance. Accordingly, further review is not warranted.

1. Petitioner contends (Pet. 9-12) that the resident inspector at its plant was acting "under color of state law" within the meaning of 42 U.S.C. 1983. The courts below correctly rejected this fact-bound contention. While formally employed by the state, the inspector was, as the district court specifically found (Pet. App. 27), "acting under color of the Federal Egg Products Inspection Act, a federal law." The inspector was enforcing the provisions of the federal statute[4] and was "closely supervised" by USDA officials (*id.* at 31). Moreover, the entire cost of the program, including the inspector's salary, was paid by the federal government (*ibid.*; see also 21 U.S.C. 1053). In

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[4]Indeed, the Inspection Act expressly preempts state law (21 U.S.C. 1052), and California's prior law on egg inspections had been repealed in 1971 after passage of the federal statute (Pet. App. 32).

these circumstances, the courts below properly determined that respondents had not acted "under color of state law." See, *e.g.*, *Askew* v. *Bloemker*, 548 F. 2d 673 (7th Cir. 1976). Since only federal action was involved, Section 1983 was therefore inapplicable. See, *e.g.*, *District of Columbia* v. *Carter*, 409 U.S. 418, 424-425; 429-430 (1973).

2. Petitioner also asserts (Pet. 13-15) that the district court erred in granting summary judgment to respondents.[5] The district court found (Pet. App. 22, 26), however, that the affidavits and other documents submitted by respondents established that they "were properly performing their duties" (*id.* at 22) and that petitioners had failed to raise a genuine issue of fact concerning the existence of a conspiracy (see Fed. R. Civ. P. 56(e)), and these determinations were upheld by the court of appeals (Pet. App. 32).

This application of Rule 56 is also supported by the Court's admonition in *Butz* v. *Economou*, 438 U.S. 478, 507-508 (1978), that

> [i]nsubstantial lawsuits [against government officers] can be quickly terminated by federal courts alert to the possibilities of artful pleading. * * * [D]amages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. * * * In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.

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[5]Petitioner has contested (Pet. 13-14) the propriety of summary judgment only with respect to the resident inspector and not with respect to the USDA officials.

See also *Baker* v. *McCollan*, 443 U.S. 137, 139 (1979); *Procunier* v. *Navarette*, 434 U.S. 555, 565 (1978); *Scheuer* v. *Rhodes*, 416 U.S. 232, 250 (1974). Faithful to this directive, the courts below properly applied Fed. R. Civ. P. 56 in granting summary judgment to respondents.

3. Petitioner lastly argues (Pet. 15-16) that the district court had jurisdiction under the Declaratory Judgment Act (28 U.S.C. 2201) to decide the constitutionality of the Inspection Act. However, it is well settled that the Declaratory Judgment Act does not confer subject-matter jurisdiction on the federal courts. See, *e.g.*, *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671-672 (1950). Accordingly, there was no authority to consider the merits of petitioner's challenge in this proceeding.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

BARBARA L. HERWIG
LINDA JAN S. PACK
Attorneys

AUGUST 1980

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[6]As the courts below noted (Pet. App. 28, 33-34), petitioner has also raised this constitutional issue in the government's forfeiture proceeding arising out of the seizure of petitioner's goods as unfit for human consumption.

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